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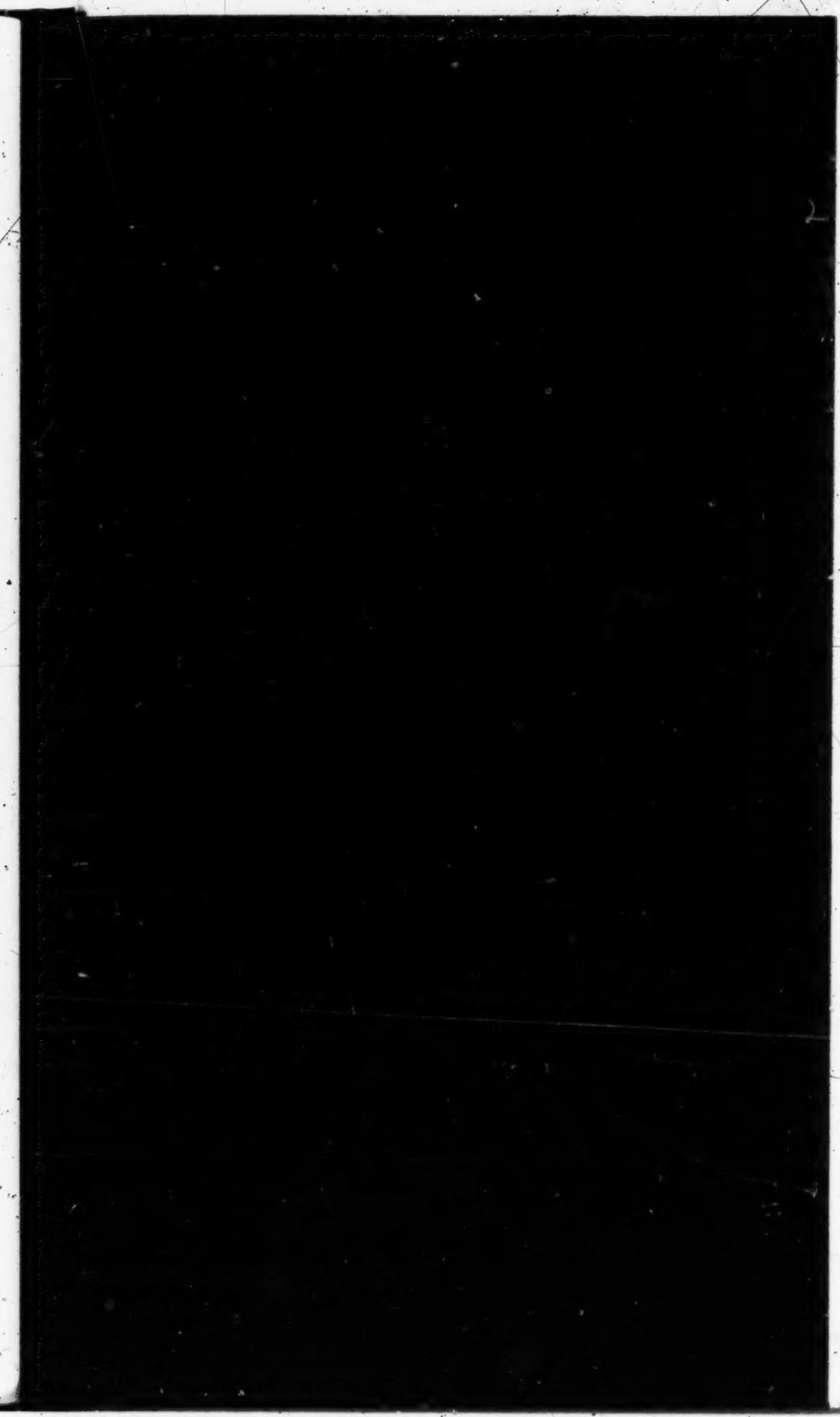

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In The

SUPREME COURT OF THE UNITED STATES

No. 6 Original, October Term, 1945.

THE STATE OF NEBRASKA, COMPLAINANT,

V.

THE STATE OF WYOMING, DEFENDANT,

AND

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

THE UTITED STATES OF AMERICA, INTERVENOR.

COMPLAINANT'S PROPOSED FORM OF DECREE AND REQUEST FOR PERMISSION TO OPPOSE PROPOSALS OF OTHER PARTIES.

WALTER R. JOHNSON,
Attorney General of Nebraska,
JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,
PAUL F. GOOD,
Special Counsel,
For Complainant.

A.

INTRODUCTORY.

Pursuant to the permission granted by this court (Opinion, page 53) the complainant, State of Nebraska,

submits the following as its proposal for a form of decree to carry into effect the decision of this court as evidenced by its opinion filed June 11, 1945. Unfortunately, the parties, after a two day conference, were unable to agree upon a form to be submitted except in part. Upon certain particulars there was substantial agreement, and in the following proposal, the complainant has endeavored to follow the pattern which the other parties wish to follow, and where there was substantial agreement, has endeavored to follow the exact language proposed by the other parties.

In the following proposal reference is made in marginal notes to the court's opinion or the Master's Report in respect to particular items which the respective portions of the decree are intended to cover. Every effort has been made by complainant correctly to reflect the intention of the court as evidenced by the opinion and by the Master's Report where the opinion adopts that report.

B.

DECREE.

This cause having heretofore, on March 5, 6 and 7, 1945, been argued and submitted upon exceptions to the Special Master's Report, and an opinion having been rendered by this court on June 11, 1945,

Now, Therefore, pursuant to said opinion and in order to carry it into effect, the following decree is hereby entered:

It Is Ordered, Adjudged and Decreed:

I.

The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigaton of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;[1]

(b) From storing or permitting the storage of more than a total amount of 17,060 acre feet of water from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;[1]

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years from and after October 1, 1945, reckoned in continuing progressive series in such manner that during the ten year period ending September 30, 1955, and during each and every ten year period ending on each and every September 30th thereafter no more water may be exported, transbasin from Jackson County, Colorado, than will make up an aggregate of 60,000 acre feet.[2]

II.

Exclusive of the Kendrick Project and Seminoe Reservoir[3] the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

1. Opinion, page 24; Master's Report, p. 177.
2. Opinion, page 25.
3. Opinion, page 26.

(a) From diverting or permitting the diversion of water in Wyoming from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land during any one irrigation season.[4]

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.[4]

III.

The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights as among themselves of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electic power when and only when such storage or release will not materially interfere with the administra-

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4. Opinion, page 26; Master's Report, p. 177.

tion of water for irrigation purposes according to the priority as decreed for the French Canal and the State Line Canals.[5]

IV.

The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and that said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:[6]

Lands	Canal	Limitation in Second Feet	Seasonal Limitation in Acre Feet
Tract of 1025 acres	French	15	2,737
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V.

The natural flow water in the Guernsey Dam to Tri-State Dam section between and including May 1 and

5. Opinion, page 33; Master's Report, p. 178
6. Opinion, pp. 27-28; Master's' Report, pp. 177-178.

September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals, and that the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and, providing further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula, taken from United States Exhibit 204A:[7]

RESERVOIR EVAPORATION LOSSES.

SEMINOE, PATHFINDER AND ALCOVA RESERVOIRS.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by coefficient of 70% to reduce pan record to open water surface.

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7. Opinion, pp. 37-38 and note 19; Master's Report, p. 179.

Guernsey Reservoir.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

River Section	Table Area Acres	Daily Loss—Second Feet. May	June	July	Aug.	Sept.
Alcova to Wendover	8360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft.; Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder dam to head of Alcova reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe dam and head of Pathfinder reservoir is less than area of

original river bed through Pathfinder reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States.

VI.

This decree is intended to and does deal with and apportion only the natural flow of the North Platte River and tributaries. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.[8]

VII.

Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as

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8. Opinion, pp. 24, 29, 31, 38, 39, 53.

may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.[9]

VIII.

The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.[10]

IX.

The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraph I and II hereof, and such records shall be available for inspection at all reasonable times.[11]

X.

This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and

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9. Opinion, pp. 50-51; Master's Report, p. 178.
10. Opinion, pp. 34-35; Master's Report, pp. 178-179.
11. Opinion, pp. 52-53.

usual domestic municipal and stock watering purposes and consumption.[12]

XI.

For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30 inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;[13]

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;[14]

(d) Return flows of the Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.[15]

XII.

That the allotment of water for Northport Canal as recommended by the Special Master and incorporated in the opinion herein, — U. S. —, (Opinion, p. 47) be and the same hereby is revised to allow a maximum from all sources for the irrigation of 13,000 acres of

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12. Opinion, page 52; Master's Report, p. 180.
13. Opinion, p. 32.
14. Opinion, pp. 48-50.
15. Opinion, pp. 34-35.

land at a diversion rate of 186 c. f. s. with a maximum seasonal diversion of 54,600 a. f.,[16] provided that the river demand of said canal shall at all times be subject to reduction by the amount of return flow intercepted by the Tri-State Canal for delivery to Northport at any given point of time.[17]

XIII.

This decree shall not affect:

(a) The relative rights of water users within any one of the affected states except as may be otherwise specifically provided herein;[18]

(b) Nor in any way cloud such claim as the United States has to storage water under Wyoming law; nor will the decree interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities;[19]

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the watershed of an entirely separate stream, and which presently do not enter said basin or the return flow from any such supply or supplies;[20]

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;[21]

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16. Master's Report, p. 232.
17. Opinion, p. 48.
18. Opinion, pp. 42-44.
19. Opinion, p. 31.
20. Opinion, p. 53.
21. Opinion, p. 2, note 1.

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIV.

Any of the parties may apply at the foot of this decree for its amendment or for further relief. The court retains jurisdiction of this suit for the purpose of any order, direction, or modificaton of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.[22] Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 594, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming;[23]

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;[24]

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;[25]

(d) The question of the right to divert at or above the headgate of the Casper Canal any water

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22. Opinion, pp. 51-52; Master's Report, p. 179.
23. Opinion, p. 26.
24. Opinion, p. 25.
25. Opinion, p. 27.

in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project.[26]

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible.[27]

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.[28]

(g) If and when importations of an additional supply or supplies of water into the basin of the North Platte river from the water shed of an entirely separate stream and which do not flow at present into the basin or the return flow from such supply or supplies, as mentioned in Paragraph XIII (c) hereof; and a dispute arises as to the uses of such waters or return flows, any party may apply for an adjudication of questions arising in connection therewith.[29]

(h) If the decree is so administered as to divert water from above Tri-State Dam to the use of those appropriating below that point, other than through the operation of the Nebraska law of administration by priorities, an application may be made as to this court for appropriate relief.[30]

XV.

The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State

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26. Opinion, p. 37.
27. Opinion, p. 33.
28. Opinion, p. 25.
29. Opinion, p. 53.
30. Opinion, pp. 30, 42-44.

of Wyoming two-fifths; and the State of Nebraska two-fifths.[31] Payment of the fees and expenses of the Special Master has been provided by a previous order of this court.

C.

REQUEST FOR PERMISSION TO OPPOSE PROPOSALS OF OTHER PARTIES.

As above stated in the introductory portion hereof, the parties after exhaustive efforts were unable to agree upon a joint proposal for a form of decree. At the conferences wherein the attempts were made, various proposals as to separate sections and paragraphs were made and complainant was given to understand that these would be embodied in proposals made by the other parties. As to some of them agreement was reached, and complainant has endeavored to incorporate them in the foregoing proposed decree. As to others, counsel for complainant were strongly of the opinion that they were not authorized by either the opinion or the Master's Report, and even in some instances that they were definitely in violation of the opinion.

In order to assist the court in judging among the various proposals, counsel for complainant hereby requests permission to submit not later than September 29, 1945, a brief criticism of other proposals. Such criticism will be based exclusively upon the opinion and the Master's Report and will be merely an endeavor to point out wherein such other proposals differ from

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31. Opinion, p. 53.

the opinion and the Master's Report. In addition, where we believe that such procedure will be helpful to the court, Nebraska's statement may point out wherein counsel for Nebraska believe that Nebraska's proposal on a particular topic more nearly reflects the opinion of this court.

Respectfully submitted,

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PAUL F. GOOD,
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For Complainant.